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February 22, 2005

MEMORANDUM TO: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

THROUGH Melissa G. Skinner
Director
AD/CVD Operations, Office 3

FROM: Dennis McClure
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Case Analysts

SUBJECT: Pasta from Italy: New Shipper Review of Atar S.r.L. (Atar)

Background

On July 30, 2004, we received a request from Atar to initiate a new shipper review of Atar's U.S. sales of pasta from Italy. On September 1, 2004, the Department published the notice of initiation of this new shipper antidumping duty review covering the period July 1, 2003, through June 30, 2004. See Certain Pasta from Italy: Notice of Initiation of New Shipper Antidumping Duty Review, 69 FR 53413 (Sept. 1, 2004).

On September 1, 2004, we sent a questionnaire to Atar, and instructed Atar to respond to Sections A-E of the questionnaire as appropriate. On October 22, 2004, Atar submitted its response to Sections A, C, and D of the original questionnaire. On November 5, 2004, Atar submitted its cost reconciliation under Section D of the questionnaire.

On November 8 and 10, 2004, the Department issued supplemental questionnaires to Atar. On December 1, 2004, we received Atar's response to the supplemental questionnaires. On December 27, 2004, the Department received a supplemental questionnaire response relating to Atar's quantity and value reconciliation requested in Section A of the questionnaire.

On December 7, 2004, we sent Atar a verification outline. We conducted verification of Atar's sales and cost information from January 10, 2005 through January 14, 2005.

Legal Framework

An exporter or producer that did not export or sell subject merchandise to the United States during the period of investigation, and that is not affiliated with a exporter or producer that did, generally may request a new shipper review seeking an individual dumping margin if it has exported, or sold for export, subject merchandise to the United States. See Section 751(a)(2)(B) of the Act; 19 C.F.R. 351.214(b). However, the exporter or producer must also show that its sales to the U.S. during the "new shipper" period of review ("POR") were *bona fide*. See Fresh Garlic from the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum ("Garlic from PRC"); and Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439 (January 10, 2003), and accompanying Issues and Decision Memorandum ("Crawfish from PRC").

In determining whether sales are *bona fide*, the Department will typically look at the totality of circumstances surrounding a sale rather than a single circumstance, barring a clearly aberrational fact pattern. Garlic from PRC; Notice of Final Results of Antidumping Duty New Shipper Review: Certain In-Shell Raw Pistachios from Iran, 68 FR 353 (January 3, 2003), and accompanying Issues and Decision Memorandum. We examine a number of factors including the timing of the sales relative to the timing of the petition, the sales prices compared to the world market price of the commodity, and the prices observed in the United States at the time of the sale. Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China, 60 FR 56045 (November 6, 1995).

The Department has the discretion to disregard U.S. sales if it determines that the sales are not *bona fide*. See Chang Tieh Industry Co., Ltd. v. U.S., 840 F. Supp.141,146 (CIT 1993)(When a respondent has "artificially orchestrated an export scheme involving artificially set prices," the agency has the discretion to disregard the U.S. sales as not resulting from *bona fide* transactions); Windmill v. United States,193 F. Supp. 2d 1303, 1307 (CIT 2002)("Windmill")(Department has discretion to determine whether sales are "unrepresentative or distortive, that is, non-bona fide ones").

This discretion is important to the Department's analysis in any review but particularly in the context of a new shipper review, the result of which is a company-specific antidumping duty margin. The integrity of our review process depends on the *bona fides* of a new shipper's commercial transactions, and it would be inappropriate to calculate an antidumping duty margin based on transactions which are not

bona fide. Otherwise, a shipper may unfairly benefit during the course of the review from the ability of its importers to post a bond in lieu of a cash deposit while we conduct the review, to the detriment of both domestic and foreign competitors who are trading pursuant to actual, commercial agreements. A shipper may also unfairly benefit after the completion of the review if it has received a company-specific antidumping duty margin calculated on the basis of transactions which were not *bona fide*.

Analysis of Atar's New Shipper Sales:

Atar's sales in this new shipper review involve multiple sales to a U.S. importer. These sales totaled [] and were valued at []. All sales were made to a single U.S. customer, []. [] is a well known and established U.S. distributor. As discussed further below, we find that a review of the totality of the circumstances surrounding Atar's sales to [] shows that these sales were *bona fide* because they do not fall outside of normal business practice and are otherwise commercially reasonable. The three factors that the Department considered in reaching this determination are as follows:

- 1) Price and Quantity;
- 2) The Sales Process;
- 3) Other Circumstances.

A) Price and Quantity

During the POR, Atar sold [] kg of pasta and made several shipments of pasta between [] at an average unit value of []. These numbers, when compared to the volumes and values of other companies that shipped pasta to the U.S. during the POR, lead to a conclusion that Atar's sales were *bona fide*.

Customs and Border Protection ("CBP") import statistics reveals that [] companies made entries of pasta to the United States during the POR.¹ The quantity and value of the shipments vary greatly among the importers. While the average quantity entered during the POR is [], the quantity ranges from []. Of the [] companies making shipments, [] companies had shipments greater than the average quantity. Atar ranked as the [] largest in quantity out of the [] companies entering pasta into the United States.

The value and average unit values of the shipments also cover a wide range. While the average value of shipments during the POR was \$ [], the average represents shipments ranging in value from

¹ See Attachment 1 to this memo which analyzes U.S. Customs import statistics of pasta for the POR July 1, 2003 - June 30, 2004.

more than \$ []. Out of the total value reported by CBP, Atar ranked [] highest in value out of [] companies. Average unit values also follow the same pattern as the value and quantity. The average unit value for shipments of pasta during the POR was []. representing a range of []. [] companies had average unit values greater than the average unit value of pasta shipped. Atar's average unit value of [] ranked [] in average unit value out of [] companies.

The wide variations in quantity, value and average unit value, and the fact that Atar's data fall comfortably within those ranges, provide support for the conclusion that Atar's sales were *bona fide*.

B) The Sales Process

During verification, we reviewed the sales and distribution process for the U.S. sales to Atar's sole customer []. We reviewed the purchase order from [] to Atar which is then sent to the toll processor []. Next, we reviewed the invoices issued by Atar and given to the Customs Broker and []. We also reviewed the monthly invoice Atar receives from [] and tied it to various purchase orders. We confirmed the booking of [] invoices in the accounts receivable as well as the payment. In addition, we reviewed the Italian customs export form and broker's invoice which we were able to tie to the purchase orders. The reconciliation of [] payments to Atar's bank statements and accounts receivable as well as the export documentation support the conclusion that these sales were *bona fide* sales.

C) Other Circumstances

The Department has established a practice of examining the importers involved in new shipper reviews to determine whether the importers are actual commercial entities.² [] has served as an importer for other pasta companies in prior reviews. Therefore, we have no reason to doubt the legitimacy of the importing party involved in this new shipper review. Further, we found no other circumstances surrounding Atar's U.S. sales that would call into question the validity of those sales.

² See Memorandum to Joseph A. Spetrini through Barbara E. Tillman: Freshwater Crawfish Tail Meat from The People's Republic of China: Whether the Sales in the New Shipper Review of North Supreme Are *Bona Fide*, (January 2, 2003) at 5-6; see also Garlic from PRC.

Recommendation

Based on the totality of the circumstances discussed above, we recommend that the Department preliminarily determine that the U.S. sales made by Atar during the POR were *bona fide*.

Agree

Disagree

Let's Discuss

Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

Date

Attachment 1
(Information Cannot Be Summarized onto the Public
Record)